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No. 93-1068

In The

Supreme Court of the United States

October Term, 1993

ARMADORES de CABOTAJE, S.A.,

Petitioner,

versus

JERRY YOUNG,

Respondent.

Petition For Writ Of Certiorari
To The Louisiana Fourth Circuit Court Of Appeal

SUPPLEMENTAL BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Respondent, Jerry Young, files this supplemental memorandum in response to the supplemental brief in support of petition for writ of certiorari filed by petitioner, Armadores de Cabotaje, S.A., (hereinafter ARCASA) specifically addressing *Howlett v. Birkdale Shipping Co., S.A.*, 114 S. Ct. 681 (1994), in which this Court granted a petition for certiorari on January 10, 1994.

In *Howlett v. Birkdale Shipping Co.*, this Court limited its writ of certiorari to the issue:

> Does not the shipowner's duty of care owed to a longshoreman under § 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in a cargo stow of which the shipowner knows or has reason to know, and which are unknown to the longshoreman and his stevedore employers, are not open and obvious, and would not normally be anticipated?

See Howlett v. Birkdale Shipping Co., S.A., Petition for Writ of Certiorari at i; 62 U.S.L.W. 3441 (U.S. Jan. 11, 1994).

On March 31, 1993, the Louisiana Fourth Circuit Court of Appeal rendered its opinion in the matter herein. *Young v. Armadores de Cabotaje, S.A.*, 617 So. 2d 517 (La. App. 4th Cir. 1993).

On October 1, 1993, the Louisiana Supreme Court denied ARCASA's application for writ of certiorari. *Young v. Armadores de Cabotaje, S.A.*, 625 So. 2d 171 (La. 1993).

The Louisiana Fourth Circuit Court of Appeal, consistent with its jurisdiction, reviewed both questions of law and fact in this case, applying its own system for

reviewing factual determinations by juries of general maritime law and Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*) cases. *Young*, 617 So. 2d at 525.

In its factual review, the Louisiana Fourth Circuit referenced testimony regarding the ARCASA vessel master's actual involvement in preparing and approving the stowage plan, finding that the evidence heard by the jury furnished support for a finding that it was more probable than not that ARCASA's conduct contributed to the plaintiff's accident and resulting injuries. *Young*, 617 So. 2d at 523, 528.

While the Louisiana Fourth Circuit Court of Appeal followed the rule enunciated by the United States Fifth Circuit Court of Appeals in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied sub nom Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050 (1990), in its review of the questions of law, the Louisiana Fourth Circuit Court of Appeal's findings on review of the facts make it clear that ARCASA is equally liable under the standard enunciated by the United States Third Circuit in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), and more recently and expansively in *Kirsch v. Plovidba*, 971 F.2d 1026 (3d Cir. 1992).

Even if the Third Circuit's interpretation of the law were found to be controlling, ARCASA would be liable.

SUMMARY OF ARGUMENT

ARCASA's writ application should be denied because the resolution of any conflict existing between the United States Courts of Appeals as to the standard of care owed by vessel owners to offloading longshoremen is irrelevant herein since ARCASA is liable to respondent under either standard.

ARGUMENT

Apparently, in granting the petition for certiorari in *Howlett v. Birkdale Shipping Co., S.A.*, 114 S. Ct. 681 (1994), this Court intends to address the conflict between the United States Third Circuit Court of Appeals and the United States Fifth and Ninth Circuit Courts of Appeals with regard to the standard of care owed by the vessel owner to an offloading longshoreman for harm caused by danger arising from cargo.

As petitioner, ARCASA, is liable under either standard, upon the evidence presented to the jury and addressed in respondent's original brief at pages 2-6, ARCASA's writ application should be denied.

Petitioner, ARCASA, interprets *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), as holding that the vessel owner has no general duty to inspect or supervise cargo operations and thus should be liable, if at all, for negligently stowed cargo only upon attaining actual knowledge of the hazard.

More accurately, the United States Third Circuit held in *Derr*, and more recently and expansively in *Kirsch v.*

Plovidba, 971 F.2d 1026 (3d Cir. 1992), that the vessel owner owes a duty of care to offloading longshoremen for harm caused by dangers arising from cargo when the vessel's own conduct caused or contributed to the dangerous condition or when the vessel had actual knowledge of a dangerous condition.

Here, the evidence was uncontroverted that ARCASA was a co-participant with defendant ENSIDESA in designing, causing, permitting and approving the manner of the stow. The jury found the stow presented an unreasonable danger to the offloading stevedore; further, that the expert offloading stevedore could do nothing to avoid the hazard and conduct cargo operations reasonably safely. *Young v. Armadores de Cabotaje, S.A.*, 617 So. 2d at 523-24.

Under either of the conflicting interpretations of *Scindia Steam Nav. Co. v. De los Santos*, 451 U.S. 156 (1981), ARCASA is liable under the particular facts and circumstances of this case.

Thus, ARCASA's petition for writ of certiorari should be denied.

CONCLUSION

ARCASA's writ application should be denied and its petition should not be consolidated with *Howlett v. Birkdale* because the resolution therein of any conflict existing between the United States Courts of Appeals as

to the standard of care owed by vessel owners to offloading longshoremen is irrelevant herein since ARCASA is liable to respondent under either standard.

Respectfully submitted,

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